No. 93-910

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

KENNETH F. BONNY, et al.,

Petitioners,

v.

THE SOCIETY OF LLOYD'S, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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COUNTER QUESTION PRESENTED

Whether this Court's unbroken line of precedents favoring enforcement of choice of forum and choice of law clauses in international agreements warranted dismissal by the courts below of Petitioners' purported federal securities law claims against the Society, Corporation, Committee and Council of Lloyd's of London, their Members' Agent at Lloyd's, three English employees of that Members' Agent, three banks against whom petitioners concede no wrongdoing was alleged, and three U.S. citizens who suggested that petitioners go to England and become members engaging in the underwriting of insurance business at Lloyd's.

STATEMENT PURSUANT TO RULE 29.1

Respondents The Society of Lloyd's, Lime Street Underwriting Agencies, Ltd., a British corporation, and Bankside Underwriting Agencies, Ltd., a British corporation, Bank of Montreal, a Canadian corporation, and Northfield Venture, Inc., an Illinois corporation, have no parent or subsidiary corporation within the meaning of Rule 29.1 of the Rules of the Supreme Court of the United States.

Respondents Harris Bank Glencoe-Northbrook and Harris Trust & Savings Bank are subsidiaries of Harris Bankcorp, Inc.

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COUNTERSTATEMENT OF THE CASE

This case arises out of the same operative facts which provided the basis for the complaints in *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.) *cert. denied*, ___ U.S. ___, 113 S. Ct. 658 (1992) and *Roby v. The Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 385 (1993). Those cases dismissed the same causes of action brought by other American[1] Names who signed the same contracts, with the same forum-selection clauses, and joined many of the same syndicates as petitioners; this Court in recent months denied petitions for *certiorari* in those cases.

Indeed, this case is peculiarly intertwined with its two companion cases where *certiorari* has been denied. Petitioners herein claim that their agent was one Robin Kingsley, who had allegedly solicited the plaintiff in *Riley*, and was a named defendant in that action. Respondent Hunken, who is a Name at Lloyd's and by whom petitioners were allegedly solicited, was a plaintiff in *Roby*. Respondents, accordingly, incorporate the statements of fact in the opinions below, and in the opinion of the Tenth Circuit in *Riley*, 969 F.2d at 955-56, and the Second Circuit in *Roby*, 996 F.2d at 1357-58.

There is no question that the petitioners' claims constitute a dispute "arising out of and relating to [their] membership of, and or underwriting of insurance business at, Lloyd's. . . . " It is conceded that petitioners had agreed in writing in England to submit such claims to English fora.

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[1] Petitioner Francesca B. Bonny is British.

REASONS FOR DENYING THE PETITION

I.

There Is No Conflict Among The Circuit Courts

The decision below follows this Court's consistent holdings and the consequent decisions of the circuit courts. Petitioners seek review of jurisprudence as to which *certiorari* has been repeatedly denied. There simply are no new issues requiring review by this Court.

Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 658 (1992), and *Roby v. The Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 385 (1993), dismissed the same causes of action by American Names who signed the same contracts, and joined many of the same syndicates, as petitioners. *Hirsch v. Oakeley Vaughan Underwriting Ltd. and the Society, Council, and Corporation of Lloyd's*, No. 89-2563, unpublished slip opinion (5th Cir. May 31, 1989), *cert. denied*, 498 U.S. 981 (1990), dismissed, in a case that arose from activities prior to the time when all of the forum selection clauses at issue here were included in membership contracts, a similar action by a Name against Lloyd's on grounds of *forum non conveniens*.[2]

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[2] Ordinary *forum non conveniens* considerations, which dictate dismissal in favor of the courts of a foreign country, apply equally to actions brought under the United States securities laws. *Howe v. Goldcorp. Inves., Ltd.*, 946 F.2d 944 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1172 (1992). The court below correctly held, *a fortiori*, that international contractual agreements to achieve the same result should be honored.

Including this case, the three circuit courts of appeal which have examined the same fact pattern pleaded herein and the same legal arguments proffered herein[3] uniformly – without so much as a single dissenting or even concurring opinion – have enforced petitioners' contractual undertakings to utilize exclusively court proceedings or arbitration in England for any dispute arising out of or relating to their membership or underwriting at Lloyd's. Each court has applied the clearly articulated jurisprudence of this Court to the unique facts presented by the contractual participation of foreign underwriters in the Lloyd's insurance market.

When petitioners entered a commercial relationship by becoming insurance underwriters, they and Lloyd's agreed with one another that their respective rights and obligations would be "governed by and construed in accordance with the laws of England," and that any dispute would be settled in "the courts of England." Petitioners' agreements with their Members' Agent contained substantially identical clauses designating English courts and law.[4] These Choice Clauses were an integral part of a

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[3] The statutory bases for each action were essentially the same:

Riley	Roby	Petitioners
15 U.S.C. § 77m	15 U.S.C. § 77m	15 U.S.C. § 77m
15 U.S.C. § 78 cc(a)	15 U.S.C. § 78 cc(a)	15 U.S.C. § 78
State Blue Sky Laws	15 U.S.C. § 77 (1)-(7)	State Blue Sky Laws

[4] Here, as petitioners acknowledge (*see* Petition at 6), petitioners' contracts with their Members' Agent contained clauses requiring arbitration in England in addition to the exclusive forum selection and choice of law clauses. The Tenth Circuit in *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 658 (1992) relied on these exact clauses in the same contracts (in standard form as required by Lloyd's byelaw) with the same Members' Agent as an additional

bargain which petitioners enjoyed for a number of years, and now seek to repudiate. Attempts to evade such clauses have been thoroughly considered and solidly rebuffed by this Court in *M/S The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). *Accord, Interamerican Trade Corp. v. Companhia Fabricadoria de Pecas*, 973 F.2d 487 (6th Cir. 1992).

The text of the relevant paragraph from petitioners' General Undertaking with Lloyd's is illustrative of petitioners' agreements, and can be found in the opinion of the Seventh Circuit at page 4a of the *Petition*, n.4: "Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to [petitioner's] membership of, and/or underwriting of insurance business at, Lloyd's."

The Seventh Circuit's decision below, involving the same forum selection provisions enforced by the courts in *Riley* and *Roby*, cases where this Court has already denied *certiorari*, confirms that there are no new issues requiring review by this Court. Having carefully reviewed this Court's decisions in *Bremen, Scherk, Mitsubishi Motors* and *Carnival Cruise Lines*, and the singular factual details of the arrangements by which an individual obtains the

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ground to dismiss, citing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3 (1970), and the Federal Arbitration Act, 9 U.S.C. § 201 *et seq.* 969 F.2d at 958-60. The courts here never had occasion to reach this question, finding the forum selection clauses more than sufficient to justify dismissal.

right to participate in insurance underwriting at Lloyd's, the Seventh Circuit came to the same correct result:

> In the present case, we are satisfied that several remedies in England vindicate plaintiffs' substantive rights while not subverting the United States policies of insuring full and fair disclosure by issuers and deterring the exploitation of United States investors.

Petition at 9a. Contrary to petitioners' strained argument (*Petition* at 8-10), slight differences in the phraseology of the three circuit court opinions do not create a "conflict" at all, let alone one remotely worthy of this Court's attention, when all three courts have, without a single dissenting or even concurring opinion, enforced the same contractual forum selection clauses on essentially the same reasoning.

Most of petitioners' other purported reasons for *certiorari* hardly deserve mention. It would be an absurd waste of this Court's time to write a discourse on all the possible meanings of "international" (*see Petition* at 10-12), when no court has expressed the slightest doubt that the relationship of U.S. Names with Lloyd's is "truly international." No other conclusion is possible. Petitioners also argue that the Seventh Circuit went farther than any other court in dismissing their securities law claims to England. *Petition* at 13. That is just not so: the Seventh Circuit's opinion adopts wholesale the analysis of the Second Circuit in *Roby*, and quotes with approval the Tenth Circuit's opinion in *Riley*. *Petition* at 9a-12a. In fact, there is nothing at all new in the Seventh Circuit's opinion.

Petitioners also neglect to tell the Court that, in fact, in the view of the Securities and Exchange Commission, they will lose little by being forced to honor their

agreements to resolve their grievances in England because their securities theories have no merit even under American law. The SEC has determined that if any "security" is involved in petitioners' underwriting of insurance at Lloyd's, compliance with Regulation D (governing limited offerings to qualified investors) meant that no registration would be required. *See* Commission letter, attached hereto as Respondents' Appendix A. That disposes of petitioners' § 12(1) claims. Moreover, if the SEC's definition of the relevant "security" is accepted, petitioners' § 12(2) claims would all be barred by statutes of limitations. Petitioners' "loss" of these claims is thus illusory, and is no more a reason for *certiorari* than it was in *Riley* or *Roby*.

II.

The Non-Moving Defendants' Agreement to Submit to English Jurisdiction is Commonplace and Does Not Warrant Review

Petitioners suggest that *certiorari* is appropriate, under the Supreme Court's supervisory powers, as applied to the "Local Defendants" because the Seventh Circuit directed the District Court to qualify its dismissal order. The "Local Defendants" are, in essence, two Americans (and a company they owned) petitioners claim acted as "agents" of their Members' Agent in the process leading up to petitioners becoming Names at Lloyd's. *See Petition* at 13a. Contrary to Petitioners' characterization, the Seventh Circuit opinion did not "conditionally affirm" the District Court. The clear language of the opinion states, " . . . that judgment of the district court is affirmed." *Id.* at 13a. Thus, the Court dismissed the Amended Complaint naming the Local Defendants along

with the nine other Defendants whose motions to dismiss were granted.[5] Engaging in a *de novo* review of the record, the Seventh Circuit determined that where, as here, claims against non-moving defendants and moving defendants are integrally related, common treatment should apply. Consistent with that position, the Court held that suit against all Defendants should be kept in a single forum. *Id.*, citing *Rosser v. Chrysler Corp.*, 864 F.2d 1299 (7th Cir. 1988); *Silverton v. Department of Treasury*, 644 F.2d 1341 (9th Cir.), *cert. denied*, 454 U.S. 895 (1981); *Loman Dev. Co. v. Daytona Hotel & Motel Suppliers, Inc.*, 817 F.2d 1533 (11th Cir. 1987).

The Seventh Circuit correctly affirmed the District Court ruling that the claims of Local and English Defendants were integrally related. The ruling was based, in part, upon petitioners' own allegations that the Local Defendants were agents of the English Defendants, and that the alleged misrepresentations were attributable to all Defendants. *Petition* at 13a.[6] The *Petition* reiterates this same theme, " . . . the Local Defendants, the Lime Street

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[5] The Bank Defendants' "participation" in the underlying transactions and their inclusion as defendants in this suit related solely to the letters of credit issued at plaintiffs' request. In the action below, plaintiffs sought to enjoin the Banks from paying on the letters of credit. Inasmuch as draws have been made on those letters of credit during the pendency of the appeals, the claims against the Bank Defendants are now essentially moot.

[6] The Amended Complaint alleges (at ¶ 40) that the Local Defendants "were at all relevant times agents of Lloyd's and Lime Street."

Defendants and Lloyd's made a host of misrepresentations to [petitioners] and failed to disclose a host of material facts and risk factors . . . Lloyd's was fully aware of the activities of these American recruiters, and both required and received reports from the Local Defendants concerning the recruitment and their compensation." *Petition* at 5. Since there is no dispute that the claims against the Local Defendants were integrally related to those against the English Defendants, it would have been inconsistent to permit piecemeal litigation for activities uniquely English, and which the petitioners had agreed at the outset (when prospects of profits existed) to pursue in England.

Petitioners cannot complain about the court's conditioning this dismissal upon those defendants agreeing to appear voluntarily in England if suit is refiled there. *Id.* at 13a.[7]

Defendants agreed to do so during oral argument (*id.*), thus satisfying the qualification imposed by the court. Petitioners have not yet commenced any suit in England against these defendants in which the latter could appear. Indeed, unlike thousands of their fellow

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[7] The requirement of an available alternative forum "ordinarily . . . will be satisfied when the defendant is amenable to process in the other jurisdiction." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981). This requirement is satisfied when the defendant consents to appear in the foreign forum. *Contact Lumber Co. v. P. T. Moges Shipping Co., Ltd.*, 918 F.2d 1446, 1450 (9th Cir. 1990). Much more elaborately conditioned dismissals requiring action abroad are the norm. *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, and cases listed at 984 (2d Cir. 1993).

Names, they have apparently not commenced suit in England against anyone.

The Seventh Circuit's commonsensical procedural decision that, since the alleged representations of these three defendants were attributable to their English principals, "the suit against all defendants should be kept in a single forum" (*Petition* at 13a), hardly raises any issue warranting review by *certiorari*.

CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

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